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EMPLOYMENT LAW—An Employer's Duty to Third Parties When Giving Employment Recommendations—*Davis v. Board of County Commissioners of Dona Ana County*

I. INTRODUCTION

In *Davis v. Board of County Commissioners of Dona Ana County*,[1] the New Mexico Court of Appeals, as a matter of first impression, held that an employer,[2] when electing to give an employment recommendation, owes prospective employers and foreseeable third parties a duty of care not to make negligent misrepresentations[3] of a current or former employee's record when a substantial risk of physical harm to the third party by the employee is foreseeable.[4] While the *Davis* decision encourages employers to provide accurate employment references, the decision makes giving employment references in New Mexico less routine and increasingly risky. Employment references present a dilemma for employers. On one hand, New Mexico employers may become increasingly wary of providing employment references because they are now faced with a possibility of being sued for: (1) defamation for giving too much information;[5] and (2) negligent misrepresentation for selective omissions in an employee reference letter.[6] On the other hand, because

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1. 987 P.2d 1172 (N.M. Ct. App. 1999).

2. The decision's reach extends only to private employers and public employers engaged in law enforcement activities. It does not apply to non-law enforcement and other public employers who are protected by sovereign immunity under the New Mexico Tort Claims Act, N.M. STAT. ANN. §§ 41-4-1 to 41-4-29 (1976) (providing immunity to public entities except in certain circumstances where the legislature has waived the immunity). *See Davis*, 987 P.2d at 1182 (emphasizing that "the immunity waiver at issue . . . is not for public officials as a whole, but only for law enforcement officers whose negligent misrepresentation cause injury by way of an enumerated tort").

3. *See id.* at 1180. The *Davis* court uses the term "negligent misrepresentation" to describe an employers duty not to make negligent misrepresentations in employment references. Negligent misrepresentation in the context of an employment reference is virtually identical to the theory of "negligent referral" first put forth by Janet Swerdlow in *Negligent Referral: A Potential Theory for Employer Liability*, 64 S. CAL. L. REV. 1645 (1991). Under the theory of "negligent referral," a former employer has a special relationship that gives rise to a duty to provide accurate information. The special relationship forms only after a prospective employer contacts a former employer seeking a reference regarding a job applicant. *See id.* at 1661. Thus, under negligent referral, a former employer, if contacted, has an affirmative duty to disclose to a prospective employer whether the applicant has any traits that could foreseeably pose a danger to the potential employer's property, employees or other third parties. *See id.* at 1652; *see also* Robert C. Cloud, *Negligent referral—What Can I Say?*, 137 ED. L. REP. 851, 853 (1999); J. Bradley Buckhalter, Comment, *Speak No Evil: Negligent Employment Referral and the Employer's Duty to Warn (Or How Employers can Have Their Cake and Eat it Too)*, 22 SEATTLE U. L. REV. 265, 267 (1998). The "negligent referral" concept advanced by Swerdlow and negligent misrepresentation in the context of an employment reference are virtually identical. The one critical difference between the two, noted by *Davis*, is that a former employer does not have an affirmative duty to give a reference, whereas in Swerdlow's negligent referral theory the former employer, if contacted, does have an affirmative duty to provide relevant information. Because *Davis* did not specifically adopt "negligent referral," this Note refrains from using the term. However, it appears that the court essentially adopted a modified form of Swerdlow's theory of "negligent referral."

4. *See Davis*, 987 P.2d at 1180. The opinion also addresses the issue of whether Davis' suit for negligent misrepresentation by law enforcement officers satisfies the New Mexico Tort Claims Act, N.M. STAT. ANN. § 41-4-12 (1976). *See id.* at 1182. This issue is beyond the scope of this Note.

5. *See* Baker v. Bhajan, 117 N.M. 278, 282, 871 P.2d 374, 378 (1994) (involving a state police officer applicant who sued his former employer for defamation, alleging that he was dismissed from the department's recruit training program because of the former employer's defamatory statements).

6. *See Davis*, 987 P.2d at 1180. For a discussion of negligent misrepresentation, see Buckhalter, *supra* note 3, at 274-91; Alex B. Long, Note, *Addressing the Cloud Over Employee References: A Survey of Recently Enacted Legislation*, 39 WM. & MARY L. REV. 177, 180-89 (1997); Susan Oliver, *Opening the Channels of Communication*

employers rely on the receipt of employment references for background information on an employee, without their benefit, employers may be sued for negligent hiring for failing to adequately inquire into the employee's background.[7] Although *Davis* may help to ensure the accuracy of employment references when given, the threat of yet another way to be sued may only encourage New Mexico employers to adopt "no comment" policies[8] that provide only minimal information regarding the former employee's work history, thus protecting themselves from potential liability, but restricting the flow of information needed for employers to make hiring decisions.[9] Conversely, the *Davis* decision may encourage employers to over-disclose, causing irreparable harm to employees who are unjustly accused of wrongful misdeeds.[10] Finally, while most courts have not imposed a duty to disclose unfavorable information about current or former employees,[11] and the *Davis* court declined to adopt such a duty, the decision moves the New Mexico courts one step closer toward establishing an affirmative duty that requires employers, when contacted for

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Among Employers: Can Employers Discard Their "No Comment" and Neutral Job Reference Policies?, 33 VAL. U. L. REV. 687, 693-728 (1999); *see also* Swerdlow, *supra* note 3 (discussing negligent referral); Cloud, *supra* note 4, at 85 (same).

7. *See* Los Ranchitos v. Tierra Grande, Inc., 116 N.M. 222, 228, 861 P.2d 263, 269 (Ct. App. 1993) (reasoning that "an individual or entity may be held liable in tort for negligent hiring, negligent supervision, or negligent retention of an employee even though it is not responsible for the wrongful acts of the employee under the doctrine of respondeat superior"); *see also* Medina v. Graham's Cowboys, Inc., 113 N.M. 471, 827 P.2d 859 (Ct. App. 1992) (holding that an employer can be held jointly and severally liable under the concept of negligent hiring for an intentional tort committed by the employee outside the scope of employment when the tort was a reasonably foreseeable result of the negligent hiring); Valdez v. Warner, 106 N.M. 305, 307, 742 P.2d 517, 519 (Ct. App. 1987) (concluding that "liability flows from a direct duty running from the employer to those members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as a result of the hiring"); Pittard v. Four Seasons Motor Inn, Inc., 101 N.M. 723, 729, 688 P.2d 333, 339 (Ct. App. 1984) (holding that negligent hiring and retention are alternative theories of liability against an employer for an employee's assault outside scope of employment); F&T Co. v. Woods, 92 N.M. 697, 699, 594 P.2d 745, 747 (1979) (reasoning that the torts of negligent hiring and negligent retention of an employee are based on the acts or omissions of an employer) (citations omitted).

The duty with respect to negligent hiring arises at the time of hiring. At this point the employer has the responsibility to conduct a reasonable investigation to determine the employee's suitability for the job. *See* S. Adler & Ellen R. Pierce, *Encouraging Employers to Abandon Their "No Comment" Policies Regarding Job References: A Reform Proposal*, 53 WASH. & LEE L. REV 1381, 1418-19 (1996); Long, *supra* note 6, at 183-84.

8. *See* Anthony J. Sperber, Comment, *When Nondisclosure Becomes Misrepresentation: Shaping Employer Liability for Incomplete Job References*, 32 U.S.F. L. REV. 405, 407 (1998) (under "no comment" policies, employers generally provide only such information as the "date[s] of employment, position and salary").

9. Initially, employers began adopting "no comment" policies in response to fears that divulging negative information about an employee's work history would result in a defamation lawsuit against them. *See* Cloud, *supra* note 3, at 851 (citing Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of Overdetterence and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45, 48-49 (1995)). For additional discussions of the growing phenomena of why employers adopt no comment policies, see Adler & Pierce, *supra* note 7; Ann M. Barry, Comment, *Defamation in the Workplace: The Impact of Increasing Employer Liability*, 72 MARQ. L. REV. 264 (1989); Kyle E. Skopic, Comment, *Potential Liability for Employee References*, 21 U. RICH. L. REV. 427 (1987); Swerdlow, *supra* note 3; Ramona L. Paetzold & Steven L. Wilborn, *Employer (Ir)rationality and the Demise of Employment References*, 30 AM. BUS. L.J. 123 (1992).

10. *See* Sperber *supra* note 8, at 407-412 (discussing the problems of over-disclosure by employers who "divulg[e] any number of an employee's negative traits")

11. *See Davis*, 987 P.2d at 1178; *see also* Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of Overdetterence and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45, 53 (1995); Buckhalter, *supra* note 3, at 266-70 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 56, at 357 (5th ed. 1984)).

an employment reference, to supply information of an employee's known misdeeds to other employers and third parties.

Part I of this Note begins with a factual description of the *Davis* case. Part II then discusses the background and benefits of employment references, and the liability associated with providing them. Part III analyzes the court's rationale in deciding *Davis*. Finally, part IV analyzes the potentially far reaching implications of the *Davis* decision on tort law and the employee-employer relationship as it relates to employment references.

II. STATEMENT OF THE CASE

Mariah C. Davis (Davis) sued the County of Dona Ana (the County) for injuries suffered while a patient at Mesilla Valley Hospital (MVH).[12] Davis alleged that hospital employee Joe Herrera (Herrera) sexually assaulted her.

Prior to working at MVH, Herrera was employed as a detention sergeant and classification officer at the Dona Ana County Detention Center (Detention Center). Davis alleged that MVH hired Herrera on "unqualified, favorable recommendations" from Herrera's supervisors at the Detention Center, Frank Steele (Steele), Director of the Detention Center and Al Mochen (Mochen), Assistant Director. Steele and Mochen gave Herrera a favorable recommendation, despite the fact that while working for the Detention Center, Steele investigated Herrera for allegedly sexually harassing female inmates.

Steele wrote an investigation report, concluding that Herrera's conduct had been "questionable" and "suspect." The report contained allegations of inappropriate sexual behavior by Herrera with female inmates, including making statements with sexual overtones, stating his desire for sex, and receiving sexual favors from inmates. Additionally, the report made reference to a pornographic video and condoms found in Herrera's office and it noted that he was in possession of underwear belonging to a juvenile. Although the allegations could not be confirmed, the report recommended Herrera be suspended without pay, demoted, and reassigned. Steele informed Herrera of his intention to seek the disciplinary action at a hearing scheduled for April 12, 1994.

Herrera resigned on April 8, 1994, thus avoiding the scheduled hearing. Upon his resignation, Herrera requested and received from Steele a letter of recommendation to be used for prospective employment. Steele, on county letterhead, wrote a positive letter of recommendation that omitted any references to the allegations of sexual harassment. The letter read as follows:

> To Whom It May Concern:
> This letter will introduce to you, Joseph V. Herrera. I have had the distinct pleasure of working with Tinie Herrera for the past two years. In my opinion he is an excellent employee and supervisor for the Dona Ana County Detention Center. In developing social programs for the inmate population, he displayed considerable initiative and imagination. Tinie was instrumental in the Department's maintenance program and was involved in remodeling projects.

12. *See Davis*, 987 P.2d 1172 (N.M. Ct. App. 1999). Unless otherwise noted, all facts in this section are taken from *Davis*, 987 P.2d at 1175-76.

> I know that this Department will suffer for his leaving. Employees of his caliber are difficult to find. I am confident that you would find Tinie to be an excellent employee. Should you need verbal confirmation of his ability, I would deem it a pleasure to respond to any inquiries that you may have.
> Sincerely,
> [Signed]
> Frank A. Steele
> Detention Administrator
> DACDC

Herrera used this letter when he applied for employment with MVH. Additionally, Davis alleged, and the County denied, that MVH called the Detention Center seeking further information on Herrera, and was informed by Mochen that Herrera was a "good person" and a "hard worker" whom he would definitely rehire. Davis alleges MVH's decision to hire Herrera was based on these unqualified recommendations. Davis filed suit against the County for the actions of Steele and Mochen under the New Mexico Tort Claims Act (the Act),[13] alleging that Steele and Mochen negligently misrepresented Herrera's qualifications and that she was damaged as a proximate result of their negligence.

During discovery, Davis requested partial summary judgment alleging: (1) under the Act, Steel and Mochen are law enforcement officers; (2) the allegations of negligent misrepresentation against them stated a claim under the Act; and (3) Steele and Mochen were acting within the scope of their duties as law enforcement officers when they made the recommendations of Herrera.

The County filed a cross-motion for summary judgment alleging that: (1) the Act did not waive immunity for the alleged acts by Steele and Mochen; (2) the County owed no duty to Davis; (3) state law provides a statutory immunity for employment references; and (4) the acts alleged of Steele and Mochen were outside the scope of their duties under the Act. The district court denied Davis' motion, but granted the County's cross-motion, ruling that the County owed no duty of care to Davis and was immune from suit under the Act for the actions of Steele and Mochen. Davis appealed both decisions of the district court. The court of appeals reversed the trial court's grant of summary judgment for the County and granted partial summary judgment for Davis, finding: (1) Steele and Mochen were law enforcement officers under the Act; and (2) the allegations of negligent misrepresentations against Steele and Mochen stated a claim for relief. The court affirmed the denial of summary judgment on whether Steele and Mochen were acting within the scope of their duties.

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13. *See* N.M. STAT. ANN. § 41-4-12 (1976) (allowing suit against governmental entities "for personal [or] bodily injury . . . resulting from assault [or] battery . . . when caused by law enforcement officers while acting within the scope of their duties"); *Davis*, 987 P.2d at 1182.

III. BACKGROUND

Employment references[14] are an important tool for an employer to determine who to hire and who not to hire.[15] Over the past two decades, the demand for references has substantially increased with surveys indicating that fifty to ninety percent of employers ask for, and check, an applicant's references.[16] References help employers verify information given to them by job applicants, help the employer predict performance or job success of the applicants, and provide other important information not revealed by other sources.[17] Typical reference information generally includes: (1) the applicant's prior employment and educational background; (2) appraisal of the applicant's personality and character; (3) appraisal applicant's work skills and capabilities; and (4) whether or not the reference providers would hire or continue to employ the applicant.[18] Many individuals can serve as references; however, former employers are generally viewed as providing the most useful reference information.[19] Employers also have an interest in providing references, because they want, and expect, to receive reference information concerning their own job applicants.[20] Another benefit in providing job references is that they may act as an incentive for the employees to be more productive. If the employee anticipates being formally recommended for a different job, it is likely they may invest more time and effort in their current job, producing better results for the employer.

Despite the benefits of giving and receiving references, employers are increasingly adopting "no comment" or "neutral job reference" policies in order to protect themselves from potential liability arising from giving employment references to current or former employees.[21] There are several problems with employers adopting "no comment" policies.[22] For example, "no comment" policies restrict the flow of information, thus forcing employers to hire employees without having important information about the employee's background necessary to make

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14. The issues concerning employment references as discussed in this Note can also occur outside the employer-employee relationship. For example, references are given by teachers, churches, and employment agencies. For clarity, this Note refers to the providers and subjects of employment recommendations as "employers" and "employees."

15. For a discussion of the importance of employer references, see Paetzold & Willborn, *supra* note 9, at 124-27; Barry, *supra* note 9, at 275.

16. *See* Barry, *supra* note 9, at 275.

17. *See* Paetzold & Wilborn, *supra* note 9, at 124.

18. *See id.* at 125.

19. *See id.*

20. *See id.* at 126.

21. *See* Saxton, *supra* note 11, at 46-47; *see also* Oliver, *supra* note 6, at 689-90 ("The principle reasons why employers have adopted 'no comment' reference policies originates from a perceived dilemma between choosing to disclose or omit negative information in a reference. . . . Specifically, when employers provide a complete reference that includes both positive and negative aspects about a former employee's employment, they risk being sued by a former employee for defamation or a Title VII retaliatory claim."); Long, *supra* note 6, at 177 ("Prompted by fear of lawsuits from disgruntled employees, many employers have adopted a 'name, rank and serial number' approach to references, confirming only employees' dates of employment and job titles."); Adler & Pierce, *supra* note 7, at 1386 ("The current reluctance of employers to provide references originates in the explosion of federal rights laws over the last several decades . . . ."). In 1995, the Society for Human Resource Management conducted a survey of more than 1,300 human resource managers. The survey revealed that 63% of the managers or members of their organizations had refused to provide references for fear of being sued. *See id.* at 1387.

22. *See* Long, *supra* note 6, at 177; Saxton, *supra* note 11, at 49-53.

an informed decision.[23] Moreover, lack of information may hurt employees by impeding their efforts to obtain new employment because many employers interpret a former employer's refusal to provide reference information as an implied negative comment.[24] One executive search firm has commented: "[m]any of [our] clients assume that if the candidate's former employer does not provide a reference, the information not being given must be negative."[25]

"No comment" policies are often justified on the grounds that: (1) there is generally no duty to warn, and (2) employers cannot be liable for what they have not said.[26] These policies are adopted because employers are faced with an increasing proliferation of tort doctrines,[27] including defamation, negligent hiring, negligent misrepresentation, intentional misrepresentation, and Title VII claims.[28] Traditionally, employers were concerned with defamation.[29] However, in recent years, courts, including the New Mexico courts, have recognized negligent hiring[30] as an actionable tort and now, following *Davis*, negligent misrepresentation in the context of employment references.

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23. *See supra* note 22.

24. *See* Saxton, *supra* note 11, at 50.

25. *Id.* (quoting Deborah S. Kleiner, *Is Silence Truly Golden? Employment references; Professionally Speaking*, 38 HUM. RESOURCES MAG. 117 (1993)). Saxton noted that the results of a 1992 survey conducted by Paul Half International (a staffing firm specializing in the accounting, finance and information technology fields) revealed that forty-four percent of responding executives "would view a former employer's refusal to comment on an employment candidate's performance as a detriment to that candidate's application." *Id.*

26. *See* Cloud, *supra* note 3.

27. *See* Oliver, *supra* note 6, at 689-90 ("Faced with a dichotomy of conflicting tort doctrines, employers have chosen to say very little about a former employee's work performance or displayed violent behavior.").

28. *See id.*; *supra* notes 5-7. The tort of intentional misrepresentation is based on RESTATEMENT (SECOND) OF TORTS § 310 (1965) [hereinafter RESTATEMENT]. *See infra* note 52. A former employee or third party must demonstrate the element of intent by demonstrating that the former employer knew the statements made to a prospective employer were false misrepresentations. *See* Oliver *supra* note 6, at 722-24. With respect to Title VII claims, the United States Supreme Court has held that former employers may be sued for giving a negative reference in retaliation for a former employee having filed a Title VII claim against the employer. *See* Robinson v. Shell Oil Co., 519 U.S. 337 (1997); Oliver, *supra* note 6, at 724-27 (discussing a former employers liability under Title VII, with regard to providing a negative employment reference).

29. *See* Oliver, *supra* note 6, at 688 n.12. While employers may be sued for defamation, the common law affords employers a conditional privilege for good-faith disclosure of information concerning an employee's performance. *See Davis*, 987 P.2d at 1181; *see also* Baker v. Bhajan, 117 N.M. at 278, 282, 871 P.2d at 374, 378 (1994). Zuniga v. Sears, Roebuck & Co., 100 N.M. 414, 417-18, 671 P.2d 662, 665-66 (Ct. App. 1983). In addition to the common law, New Mexico has enacted a statutory qualified privilege, N.M. STAT. ANN. § 50-12-1, which reads:

> When requested to provide a reference on a former or current employee, an employer acting in good faith is immune from liability for comments about the former employee's job performance. The immunity shall not apply when the reference information supplied was knowingly false or deliberately misleading, was rendered with malicious purpose or violated any civil rights of the former employee.

In general, court decisions involving an employee's claim that a former employer's job reference was defamatory fall into three categories. "A claim of defamation exists if the employer: (1) provides an inadequate or vague reference; (2) refuses to give a reference and thereby forces the employee to repeat the defamatory reasons for his dismissal (compelled self-publication); or (3) either knowingly or recklessly provides an unfavorable, false reference (malice)." Valerie L. Acoff, Note, *References Available Upon Request... Not!—Employers are Being Sued For Providing Employee Job References*, 17 AM. J. TRIAL ADVOC. 755, 761 (Spring 1994). For additional discussions of defamation in the employment reference context, see Barry, *supra* note 9; Swerdlow, *supra* note 3; Paetzold & Wilborn, *supra* note 9; Long, *supra* note 6.

30. *See supra* note 7.

Most courts have not imposed on employers an affirmative duty to disclose unfavorable information about current or former employees.[31] Additionally, not all states recognize the tort of negligent misrepresentation.[32] New Mexico, however, has recognized negligent misrepresentation as an actionable tort.[33] A negligent misrepresentation is a statement made for the guidance of others, which is not accurate based on the information held by the person making it.[34] To recover under a claim of negligent misrepresentation, "the offending party must have breached a duty of disclosure owed to the injured party, the injured party must have had a right to rely on the misinformation, and it must have sustained damages."[35] Negligent misrepresentation in the context of employment references is analyzed under the general principles of negligence.[36]

Under the general principles of negligence, the determination of whether or not a duty exists between the plaintiff and the defendant is essential to determine liability.[37] To determine duty in New Mexico, one must first determine to whom the duty is owed.[38] Under New Mexico law, a defendant owes a duty to all foreseeable plaintiffs.[39] In determining whether or not injury to a plaintiff is foreseeable, courts look to the existence of a special relationship.[40] As a general rule, absent a showing that a party has a special relationship with another, a party has no duty to protect others who are endangered by a third party's conduct.[41] However, every person who

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31. *See supra* note 11 and accompanying text.

32. *See, e.g.*, Bentley v. Legent Corp., 849 F. Supp. 429 (E.D. Va. 1994) (holding that Virginia law does not recognize a tort of negligent misrepresentation).

33. *See* Maxey v. Quintana, 84 N.M. 38, 42, 499 P.2d 356 360 (Ct. App. 1972) (holding that in New Mexico negligent misrepresentation is an action upon which relief can be granted).

34. *See* Grenell v. City of Hermosa Beach, 163 Cal. Rptr. 315, 319 (1980) (negligent misrepresentation is a "statement made for the guidance of others which is not warranted by the information of the person making it"); *see also* Falls Sand and Gravel Co. v. Western Concrete, Inc., 270 F. Supp. 495, 500 (D. Mont. 1967) ("negligent misrepresentation has been defined as 'a false statement made by one who has no reasonable grounds for believing it to be true, although he does not know that it is untrue, or even believes it to be true.'"); Paiz v. State Farm Fire & Cas. Co., 118 N.M. 203, 209, 880 P.2d 300, 306 (1994) (negligent misrepresentation involves making an untrue statement).

35. Ruiz v. Garcia, 115 N.M. 269, 274, 850 P.2d 972, 977 (1993); *see also* Parker v. E.I. Du Pont De Nemours & Co., Inc., 121 N.M. 120, 132, 909 P.2d 1, 13 (Ct. App. 1995) (reasoning that in order to prevail under a theory of negligent misrepresentation, a plaintiff must show that: "(1) [the defendant] made a material misrepresentation of fact to [p]laintiffs, (2) [p]laintiffs relied upon such representation, (3) [the defendant] knew the representation was false at the time it was made or made it recklessly, and (4) [the defendant] intended to induce [p]laintiffs to rely on such representation.").

36. *See generally Davis*, 987 P.2d at 1177. *See also* Maxey v. Quintana, 84 N.M. 38, 42, 499 P.2d 356 360 (Ct. App. 1972) (New Mexico courts have held that "negligent misrepresentation is an action upon which relief can be granted, that it is a tort determined by the general principle of the law of negligence and that it is an action separate from the action of fraud or deceit.").

37. *See* Schear v. Bd. of County Comm'rs, 101 N.M. 671, 672, 687 P.2d 728, 729 (1984) ("[a] finding of negligence is dependent upon the existence of a duty on the part of the defendant"); Calkins v. Cox Estates, 110 N.M. 59, 62, n.1, 792 P.2d 36, 39, n.1 (1990) (reasoning that "[d]uty thus defines the legal obligations of one party toward another and limits the reach of potential liability").

38. *See Calkins*, 110 N.M. at 62, 792 P.2d at 39 (duty is a question of policy which is determined by referring to legal precedent, statutes, and other principles of law).

39. *See id.* (citing Palsgraf v. Long Island R.R., 162 N.E. 99 (1928)).

40. *See Davis*, 987 P.2d at 1177.

41. *See id.* (citing Ciup v. Chevron U.S.A., Inc., 122 N.M. 537, 539, 928 P.2d 263, 265 (1996)); *see also* RESTATEMENT, *supra* note 28, § 314, at 116; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 375 (5th ed. 1984). Examples of special relationships include: (1) psychotherapist and patient; (2)

chooses to act has a duty to exercise ordinary care for the safety of others.[42] Thus, if an employer does not provide a reference, no duty is established with third parties.[43] However, if an employer chooses to supply a reference then he has a duty to exercise reasonable care.[44]

Of the jurisdictions that have addressed duty in the context of misleading employer references, few have concluded that no duty is imposed because there was no special relationship between the plaintiff and third party and/or the third party was not a foreseeable victim.[45] However, those jurisdictions recognizing a duty in the context of misleading employer references have concluded that although employers generally may not have an affirmative duty to disclose negative information about employees, employers may be liable to third parties for disclosing negligent misrepresentations, or misleading half-truths, about those employees who present a foreseeable risk of physical harm to others.[46]

A prominent case discussing negligent misrepresentations in the context of employment references is *Randi W. v. Muroc Joint Unified School District,*[47] where the California Supreme Court, relying on *Restatement (Second) Torts (Restatement)* sections 310 and 311, held that a writer of a recommendation letter owes a third party a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if doing so would present a foreseeable, substantial risk of injury to a third party.[48] The plaintiff, Randi W. (Randi), a student at Livingston Middle School (Livingston), claimed that Robert Gadams (Gadams), the school's vice-principal, molested her. Randi sued Gadams, Livingston and various other school districts that had provided Gadams with favorable recommendations despite their knowledge of numerous complaints involving sexual misconduct at his

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doctor and patient; and (3) parent and child. *See* Swerdlow, *supra* note 3, at 1660; RESTATEMENT, *supra* §§ 316-319.

While there is generally no duty to warn, courts have carved out exceptions. Most notably, in the seminal case of *Tarasoff v. Regents of the University of California*, the California Supreme Court held that there is a duty to warn a third party where: (1) there exists a special relationship between the defendant and either the aggressor or the potential victim; (2) the risk of harm is foreseeable; and (3) the victim is readily identifiable. *See Tarasoff*, 551 P.2d at 334, 342-43 (1976); *see also* Swerdlow, *supra* note 3, at 1657-63.

42. *See Davis*, 987 P.2d at 1178 (quoting Lerma *ex rel.* Lerma v. State Highway Dep't, 117 N.M. 782, 784, 877 P.2d 1085, 1087 (1994)); *see also* N.M. U.J.I. CIV. 13-1604.

43. *See Davis*, 987 P.2d at 1179 ("The County's agents could have remained silent in response to requests for information about Herrera.").

44. *See id.*

45. *See id.* at 1178 (citing Cohen v. Wales, 518 N.Y.S.2d 633, 634 (N.Y. App. Div. 1987) (refusing with only limited discussion to recognize a duty in recommending former employee "where another party is responsible for the actual hiring")); *see also* Moore v. St. Joseph Nursing Home Inc., 459 N.W.2d 100, 103 (Mich. Ct. App. 1990) (finding an employer had no duty to disclose a former employee's work record, which included violence and drug use, and was not liable for negligence to the estate of an employee who was murdered by the former employee).

46. *See Davis*, 987 P.2d at 1178 (citing Gutzan v. Altair Airlines, Inc., 766 F.2d 135, 140 (3d Cir. 1985) (interpreting Pennsylvania law and recognizing a cause of action for negligent misrepresentation, citing to the RESTATEMENT, *supra* note 28, §§ 311, 324(A)); Randi W. v. Muroc Joint Unified Sch. Dist., 929 P.2d 582, 587 (Cal. 1997) (en banc) (recognizing the tort of negligent misrepresentation, relying on the RESTATEMENT, *supra* §§ 310-311); Golden Spread Council, Inc. v. Akins, 926 S.W.2d 287, 291 (Tex. 1996) (recognizing a cause of action for negligent misrepresentation causing physical harm to a third party, citing to the RESTATEMENT, *supra* § 302(B), when local Boy Scout Council recommended a scout master the Council knew or should have known was a sexual deviant)).

47. 929 P.2d 582 (Cal. 1997).

48. *See id.* at 591.

prior employment.[49] The various recommendations included such remarks as: Gadams showed "genuine concern" for students; he was "an upbeat, enthusiastic administrator who relates well to the students;" he was largely responsible for creating "a safe, orderly and clean environment for students and staff;" "I wouldn't hesitate to recommend Mr. Gadams for any position!"; and he was recommended "for an assistant principalship or equivalent position without reservation."[50] The issue before the court was whether to "impose tort liability on employers who fail to use reasonable care in recommending former employees for employment without disclosing material information bearing on their fitness."[51]

The *Randi W.* court, in adopting *Restatement* sections 310 and 311, analyzed the negligent misrepresentation claim by employing a four-part test.[52] First, it considered whether the defendants owed a duty to the plaintiff.[53] The court concluded that the writer of a letter of recommendation owes a duty to third parties not to misrepresent the qualifications and character of a former employee, if making the misrepresentations would present a substantial foreseeable risk of harm to the third party.[54] The court came to this conclusion by applying general tort principles. It reasoned that the harm was foreseeable, the misrepresentation of an employee's known dangerous propensities is morally blameworthy, and the imposition of a duty to not misrepresent material information in an employment reference is not unduly burdensome.[55] However, the court cautioned that in the absence of resulting physical injury, or some special relationship between the parties, "the writer of a letter of a recommendation should have no duty of care extending to third persons for misrepresentations made concerning former employees."[56]

Second, the court considered whether the references contained "misleading misrepresentations" or "false information" within the meaning of Restatement sections 310 or 311.[57] The court concluded that the letters recommending Gadams for any position without reservation, "constituted affirmative representations that strongly implied Gadams was fit to interact properly with females."[58] Further, the court concluded that misleading half-truths could invoke an exception to the general rule excluding liability for mere nondisclosure.

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49. *See id.* at 584-85.
50. *Id.* at 585.
51. *Id.* at 584.
52. *See id.* at 587-88. Section 310 reads:

> [a]n actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor (a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and (b) knows (i) that the statement is false, or (ii) that he has not the knowledge which he professes.

RESTATEMENT, *supra* note 28, § 310. For section 311, see *infra* note 91.
53. *See Randi W.*, 929 P.2d at 588-89.
54. *See id.* at 591.
55. *See id.* at 588.
56. *Id.* at 591.
57. *See id.* at 591-93.
58. *Id.* at 593.

Third, the court analyzed whether Livingston relied on the references in hiring Gadams and whether Randi needed to show a reliance on the references.[59] The court reasoned that under the *Restatement* provisions, Randi need only allege that her injury resulted because of the "action that the recipient of defendants' misrepresentations took in reliance on them."[60] Lastly, the court concluded that Randi's injury was foreseeable and a proximate result of Livingston's decision to hire Gadams in reliance on the defendants' misrepresentations of him.[61]

Similarly, in *Golden Spread Council, Inc. v. Akins*,[62] the Texas Supreme Court held that the affirmative act of making a reference created a duty to use reasonable care in light of the information possessed.[63] In *Golden Spread*, Melvin Estes (Estes), a scoutmaster, made sexual advances towards several children including the plaintiff.[64] These allegations were made know to the Golden Spread Council of the Boy Scouts of America (GSC).[65] However, shortly thereafter, GSC recommended Estes to a local church group that had started Troop 223.[66] In reliance on GSC's recommendation, the church group hired Estes.[67] After being made scoutmaster of Troop 223, Estes resumed molesting the plaintiff, who had recently joined Troop 223.[68] The minor's mother sued the Boy Scouts of America (BSA) and the GSC for "negligent failure to screen, train and supervise Estes and for their failure to remove Estes from his position as scoutmaster."[69] The trial court granted BSA and GSC's motion for summary judgment.[70] The court of appeals reversed and remanded with respect to both defendants.[71] The Texas Supreme Court did not address negligent misrepresentation by name; however, as the dissenting opinion observed, the majority "simply describe[d] a negligent misrepresentation cause of action . . . ."[72] The majority rendered judgment for BSA, concluding that they owed no duty to the plaintiff.[73] However, the court found that GSC's "affirmative act of recommending Estes as a potential scoutmaster to the church created a duty on the part of GSC to use reasonable care in light of the information it had received."[74] The court held that if GSC knew or should have known that Estes was likely to molest boys, it had a duty not to recommend him as scoutmaster.[75] The court reasoned that GSC's duty was best expressed in comment e to section 302B of the *Restatement*, which recognizes that liability may exist "[w]here the actor has brought into contact or association with the other a person whom the actor knows or should know to be

59. *See id.* at 593-94.
60. *Id.* at 594.
61. *See id.*
62. 926 S.W.2d 287 (Tex. 1996).
63. *See id.* at 292.
64. *See id.* at 289.
65. *See id.*
66. *See id.*
67. *See id.*
68. *See id.*
69. *Id.* at 289.
70. *See id.*
71. *See id.*
72. *Id.* at 295.
73. *See id.* at 290.
74. *Id.* at 291.
75. *See id.* at 292.

peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct."[76]

In contrast, in *Cohen v. Wales*,[77] the New York Appellate Division, in a limited discussion, refused to recognize a duty in recommending a former employee "where another party is responsible for the actual hiring."[78] In *Cohen*, the plaintiff's claim of negligence against the defendant was based on the fact that defendant recommended a former employee for a position as a grammar school teacher without disclosing the fact that he had been charged with sexual misconduct.[79] Eleven years later, the teacher caused injury to the plaintiff.[80] The court concluded that the "mere recommendation of a person for potential employment is not a proper basis for asserting a claim of negligence where another party is responsible for the actual hiring" and that there were no policy reasons warranting the expansion of the common-law duty of the school since the plaintiffs had an adequate remedy at law against the school district which had custody of the infant at the time of the injury and also against the wrongdoer.[81]

Despite *Cohen*, the majority of jurisdictions that have addressed an employer's duty in the context of misleading employer references have held that employers may be liable to foreseeable third parties for negligent misrepresentations regarding employees who cause physical harm to third parties.[82] In *Davis*, the New Mexico Court of Appeals joined these jurisdictions, holding that employers, when making employee recommendations, have a duty to exercise reasonable care to not misrepresent an employee's record when to do so would create a foreseeable risk of physical injury to third parties.[83]

IV. RATIONALE

Davis began by considering two questions.[84] First, do employers who elect to provide employment references owe a duty of reasonable care in regard to what they say and how they say it?[85] Second, do such employers owe a duty of care to third parties as well as the prospective employer to whom the recommendation is given?[86] The court noted that its analysis was limited to the case at hand involving a substantial, foreseeable risk of physical harm to a third party by the employee when reasonable care is not exercised by an employer about what is said when making an unqualified recommendation.[87]

In finding that employers who provide references owe a duty of reasonable care regarding what they say, the court applied general New Mexico tort principles.

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76. *Id.* at 291 (citing RESTATEMENT, *supra* note 28, § 302B).
77. 518 N.Y.S.2d 633 (N.Y. App. Div. 1987).
78. *Id.* at 634.
79. *See id.* at 633.
80. *See id.* at 633-34.
81. *See id.* at 634.
82. *See* David v. Bd. of County Comm'rs, 987 P.2d 1172, 1178 (N.M. Ct. App. 1999); *see also supra* note 36.
83. *See Davis*, 987 P.2d at 1180.
84. *See id.* at 1177.
85. *See id.*
86. *See id.*
87. *See id.*

Recognizing that policy determines duty,[88] the court concluded that a person who chooses to act owes a duty to exercise reasonable care for the safety of others.[89] The court then applied the California Supreme Court's rationale in *Randi W.*[90] and the principles found in *Restatement* section 311[91] to hold that employers, when making employee recommendations, have a duty to exercise reasonable care to not misrepresent an employee's record when to do so would create a foreseeable risk of physical injury to third parties.[92] Relying on the commentary to section 311, *Davis* concluded that that section applies to those giving information to a person who "knows or should realize that the safety of the person of others may depend upon the accuracy of the information."[93] Additionally, the court concluded that a misrepresentation may breach a duty of care owed not only to the person to whom it is addressed, but also a duty of care owed to third parties whom the speaker should recognize as likely to be in danger by action taken by the addressee in reliance upon the misrepresentation.[94] The court found these principles "harmonious" with the general rule of law in New Mexico that governs duty of care and duty to third parties.[95] Thus, this court, in the context of the case, found that the principles set forth in section 311 apply to an employer's duty of care in making employee recommendations and the circumstances where the duty extends to foreseeable third parties.[96] Additionally, the court noted that its holding was limited to negligent misrepresentation cases in which there is a voluntary offer of a recommendation.[97] The court was of the opinion that the cases cited by the County[98]

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88. *See id.*
89. *See id.* at 1178.
90. *See id.* For a discussion of the *Randi W.* case, see *supra* part III.
91. *See Davis*, 987 P.2d at 1178-79. RESTATEMENT, *supra* note 28, § 311 reads:
Negligent Misrepresentation Involving Risk of Physical Harm
(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
(a) to the other, or
(b) to such third persons as the actor should expect to be put in peril by the action taken.
(2) Such negligence may consist of failure to exercise reasonable care
(a) in ascertaining the accuracy of the information, or
(b) in the manner in which it is communicated.
92. *See Davis*, 987 P.2d at 1180.
93. *Id.* at 1179; *see also* RESTATEMENT, *supra* note 28, §§ 311 cmt. B & 310 cmts. c-d.
94. *See Davis*, 987 P.2d at 1180 (citing RESTATEMENT, *supra* note 28, §§ 310 cmt. C & 311 cmt. d).
95. *See id.* at 1179.
96. *See id.*
97. *See id.* at 1180.
98. *See id.* at 1179 (citing Janssen v. Am. Hawaii Cruises, Inc., 731 P.2d 163, 165 (Haw. 1987) (employee who had been sexually assaulted by another employee sued the employer and the union who had referred the assaulting employee); Murdock v. Higgins, 559 N.W.2d 639, 641-42 (Mich. 1997) (volunteer at county social services department, who was sexually assaulted by a department employee, brought negligence action against employee's former supervisor at another department, alleging that supervisor failed to warn department to which employee transferred regarding allegations of sexual misconduct with young males); Moore v. St. Joseph Nursing Home, Inc., 459 N.W.2d 100, 101-02 (Mich. Ct. App. 1990) (estate of an individual who was murdered by a co-worker sued the employer alleging that the co-worker's former employer was negligent in failing to disclose to prospective employer the co-worker's misdeeds); Cohen v. Wales, 518 N.Y.S.2d 633, 633 (N.Y. App. Div. 1987) (plaintiff brought suit against defendant alleging that it negligently recommended a former employee for a teaching position without disclosing that the teacher had been charged with sexual misconduct); Hoicowitz v. Positive Educ. Program, 645 N.E.2d 89, 90 (Ohio Ct. App. 1994) (plaintiff brought suit against the defendant alleging tortious

were easily "distinguishable or unpersuasive."[99] According to the court, the cases involved "situations in which the employer either did not offer a recommendation, or was not sued for the tort of negligent misrepresentation."[100] However, the court concluded that the opinions did support "the proposition that an employer may elect *not* to make a reference, even if it realizes that the information in its possession would be helpful to the prospective employer."[101]

Applying these principles to the case at hand, the court concluded that nothing in the facts made Herrera's assault on Davis remote or unforeseeable as a matter of law.[102] Additionally, the court pointed out that Steele and Mochen could have refused to supply a recommendation, but they instead chose to act in a manner that distorted the truth.[103] The court found that reasonable people possessing the information known by Steele and Mochen could have foreseen that the omission of the information might result in potential harm to third parties.[104] The court specifically noted that the holding was intentionally narrow and declined to speculate how different facts and circumstances such as the lapse of time between referral and the assault might affect duty and where to "draw the line."[105]

After determining that by electing to provide an employment recommendation for Herrera, Steele and Mochen owed a duty of care to Davis regarding what they said and what they omitted, the court addressed the County's other arguments.[106] First, the court addressed the County's argument that Davis' claim was not actionable because Davis did not rely on the statements made to MVH. The court dismissed this argument, reasoning that lack of reliance in situations such as these is immaterial.[107] Citing to the *Restatement* section 310 and 311 comments, the court concluded that a victim of physical violence need not rely on or be a party to the negligent misrepresentation, "as long as the injury is a result of the recipient's reliance on the employer's misrepresentation."[108] The court reasoned that Davis had presented evidence that her injury resulted from MVH's reliance on the misleading employee reference from Steele and Mochen, and that this was sufficient to present an actionable claim under the circumstances.

The County next argued that no special relationship between the County and Davis existed and as a result, the County owed no duty to Davis.[109] The court rejected this argument, finding the County's affirmative act of offering a

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interference with a business contract or relationship for not providing a employment letter per an agreement between the parties)).

99. *Davis*, 987 P.2d at 1179.

100. *Id.*

101. *Id.*

102. *See id.*

103. *See id.*

104. *See id.* at 1179-80.

105. *See id.* at 1180. Thus, in New Mexico, in order so show negligent misrepresentation in the context of employment references, the court's holding appears to require that: (1) the employer foresees that a former employee receiving the recommendation will present a risk of substantial harm to a third party; (2) despite the risk, the employer provides a positive recommendation of the employee to a potential employer; and (3) physical injury to a third party occurs. *See generally Davis*, 987 P.2d at 1177-82; *see also* Buckhalter, *supra* note 3, at 287-88.

106. *See Davis*, 987 P.2d at 1180.

107. *See id.*

108. *Id.*

109. *See id.*

recommendation created a duty to exercise reasonable care.[110] The County's next contention was that Steele and Mochen did not literally misrepresent anything to MVH because MVH never specifically asked why Herrera had resigned.[111] However, the court refuted this argument, concluding that if the employer speaks, he must "disclose enough to prevent his words from being misleading."[112] Lastly, the County argued that public policy should discourage the court from imposing a duty because to do so would (1) invite litigation and (2) negatively affect employers' willingness to give references.[113] Addressing these arguments, the court concluded that it had restricted the holding so as to not encourage mass litigation.[114] The court, however, was "intrigued" by the County's policy argument that the expansion of tort duty would have a "chilling" effect on an employer's willingness to give employment references, and thus responded to it in great detail.[115]

The court agreed with the County's assertion that public policy supports full and accurate disclosure of non-confidential information by employers, and noted that they "seek to encourage employers in that direction."[116] The court was of the opinion that "full and accurate disclosure of non-confidential information by employers promotes a safe work environment."[117] According to the court, New Mexico's common law reflects a policy of encouraging employer disclosure by recognizing a qualified privilege against defamation.[118] This privilege against defamation claims "provides an employer qualified immunity for good-faith disclosures about employee performance, thereby encouraging such disclosure for the benefit of prospective employers and third parties who may be placed in harm's way without it."[119] Additionally, the court pointed out that the Legislature in 1995 enacted New Mexico Statutes Annotated section 50-12-1,[120] which provides employers immunity from liability for comments about a former employee's job performance when they have acted in good faith.[121]

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110. *See id. Compare* Hayes v. Baker, 648 N.Y.S.2d 158 (N.Y. App. Div. 1996). In *Hayes*, the plaintiff, an infant, was sexually abused by the defendant, Ross Baker, while Baker was babysitting the plaintiff. Baker had been hired by plaintiff's mother after the mother obtained Baker's name from a community service referral program sponsored by the Department of Parks and Recreation of the defendant Village of Rockville Centre (the Village). *See id.* at 159. In reversing the lower court's refusal to grant summary judgment for the Village, the court held that the "plaintiffs cannot recover based on a theory of negligent misrepresentation as they have failed to demonstrate the existence of any special relationship with the Village or that the infant's injuries were proximately caused by the alleged misstatement, both necessary elements of such a cause of action." *Id.*

111. *See Davis*, 987 P.2d at 1180.

112. *See id.*

113. *See id.* at 1181.

114. *See id.*

115. *See id.*

116. *See id.*

117. *Id.*

118. *See id.*

119. *Id.*

120. N.M. STAT. ANN. § 50-12-1 reads:

> When requested to provide a reference on a former or current employee, an employer acting in good faith is immune from liability for comments about the former employee's job performance. The immunity shall not apply when the reference information supplied was knowingly false or deliberately misleading, was rendered with malicious purpose or violated any civil rights of the former employee.

121. *See Davis*, 987 P.2d at 1181-82. Section 50-12-1 did not apply to this action because it was not enacted until 1995, after the events in this case had occurred.

The court acknowledged that the common-law duty it was recognizing might discourage some employment referrals.[122] However, the court reasoned that the impact would be minimal, as the duty applies only in cases of foreseeable physical harm, and it concluded that the vast majority of cases will involve situations that do not create a risk of foreseeable physical harm.[123] According to the court, when physical harm by the employee is foreseeable, the employer who discloses will be protected against defamation by the qualified immunity privilege under section 50-12-1. Moreover, the court reasoned that even if an "overly cautious employer" remains silent, the silence is preferable to the misrepresentation of which Steele and Mochen were accused. The court noted that when confronted with silence from a current or former employer, the prospective employer can still conduct its own investigation. However, if a prospective employer is misled, it will be more likely to "relax its own guard" and not investigate thoroughly.[124] Thus, the court concluded that the policy gains of imposing a duty not to misrepresent outweighed the possible consequences of inhibiting employer disclosure.

V. IMPLICATIONS

Recent decisions around the United States are expanding tort liability, becoming less tolerant of workplace violence and increasingly holding employers liable for their hiring decisions.[125] In *Davis*, New Mexico joined this trend in a decision that may have far reaching implications for the employee-employer relationship. As noted by one commentator on the decision, "[w]hile a free and open exchange of information would be helpful to [employers], this decision provides further reason for [employers] to refrain from disclosing anything more than 'name, rank, and serial number' about job seeking employees."[126]

Although *Davis* seeks to encourage employers to provide accurate employment references, the decision presents potential problems for both the employer and employee.[127] First, the decision may increase employer reluctance to provide employment references out of concern for potential liability. Rather than playing the balancing game between giving too much information and omitting information, an employer may decide that the more prudent course of action would be to give no reference at all. This result is burdensome and contrary to public policy supporting

122. *See id.* at 1182.
123. *See id.*
124. *See id.*
125. *See* Oliver, *supra* note 6, at 688-89.
126. Hinkle, Cox, Eaton, Coffield & Hensley, P.L.L.C, N.M. 5 Employment Letter 2 (Sept. 1999).
127. The scope of the *Davis* decision is confined to cases in which a former employee causes physical harm to a third party. However, whether or not the logic of the opinion would apply to harm, both physical and monetary, caused by the new employee to the new employer remains to be seen. For example, what if an employer, relying on a favorable but false recommendation by a former employer, hires the employee who then either negligently or intentionally commits an act of malfeasance, which costs the new employer money (for example, a new employee embezzles money from the new employer)? Would the new employer have a claim against the old employer? It appears that such might well be a logical extension of *Davis*. *See Davis*, 987 P.2d at 1172 (framing the first issue to be decided in the case as "whether an employer owes *prospective employers* and foreseeable third persons a duty of reasonable care not to misrepresent material facts in the course of making an employment recommendation about a present or former employee, when a substantial risk of physical harm to third persons by the employee is foreseeable") (emphasis added).

full and accurate disclosure of non-confidential information by employers concerning employees.[128] Moreover, assuming employers will be less likely to give a reference, it becomes more difficult for hiring employers to investigate prospective employees so as to avoid a claim of negligent hiring.[129] Second, this decision may encourage employers who provide employment references to over-disclose an employee's negative traits.[130] The effects of over-disclosure would have consequences for both the employee and employer. If employers play this balancing game and err on the side of over-disclosure, employers may face potential tort exposure for the invasion of privacy,[131] infliction of emotional distress, and interference with contractual relations.[132] These causes of action exist in addition to risking exposure to a claim of defamation, which is the most common claim arising from the giving of references.[133] Although employers have a qualified immunity for acting in good faith, defending a defamation suit is costly.[134] Further, while evidence indicates that employers win the vast majority of defamation suits brought against them, the costs and time expended in defending the suits are a deterrence to employers providing employment references.[135] This expense is particularly burdensome to non-profit organizations and small businesses.[136] Although a qualified immunity privilege is helpful, it may not be an adequate remedy when compared to the burden of the defamation suits. The effects of over-disclosure on an innocent employee could also be devastating. Indeed, it is easy to imagine a career destroyed by information released by a disgruntled or misguided employer. The reality is that in general, employers are neither trained, nor have the resources to investigate allegations of wrongdoing and substantiate the truth of them; nor are they fit to play the role of judge and jury. Thus, because of lack of investigative ability, employers may be overzealous in reporting unfounded allegations when providing an employment reference, resulting in loss of employment opportunities for the employee.

Davis also raises questions of how New Mexico courts will deal with similar types of situations involving the giving of an employment reference. Will other employment recommendation situations be treated differently? There appear to be three different employment recommendation scenarios. The first type, dealt with in *Davis*, occurs where the employee requests a letter from the former employer who issues a generic "To Whom it May Concern Letter." The second type of

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128. *See id.* at 1181 (stating that "public policy supports full and accurate disclosure of non-confidential" employee information).

129. *See* Buckhalter, *supra* note 3, at 269.

130. *See* Sperber, *supra* note 8, at 410-13.

131. *See id.*; *see also* Kurt H. Decker, *Employment Privacy Law for the 1990's*, 15 PEPP. L. REV. 551 (1988) (discussing privacy in the context of the employment setting); Scott L. Fast, *Breach of Employee Confidentiality: Moving Toward a Common-Law Tort Remedy*, 142 U. PA. L. REV. 431 (1993) (discussing the need for a legal remedy when an employer discloses confidential information without employee consent).

132. *See* Sperber, *supra* note 8, at 410-412.

133. *See supra* note 29 and accompanying text.

134. *See* Long, *supra* note 6, at 191-92.

135. *See id.* at 191. The court stated: "Abuse of the conditional privilege to defame is generally a question of fact for a jury. Unless employers are able to obtain summary judgments, they most likely will spend substantial time and money defending against defamation claims." *Id.* at 192.

136. *See id.* at 191-92.

employment recommendation, also dealt with in *Davis*, occurs when the former employer writes or gives a verbal recommendation upon request from the new employer. Finally, the third situation arises where the employee requests a reference letter from the former employer, requesting that it be sent to a potential new employer. *Davis* and other similar opinions appear to hinge on the former employer's knowledge of the employee's history of wrongdoing, not on whether the recommendation letter was, or was not solicited, and by whom it was solicited. It is logical to assume that under the first scenario, where the former employer simply issues a generic letter not knowing when and where it would be used, less liability is created. In this scenario, although the former employer has misrepresented facts about the employee, arguably since they had no knowledge of where the letter would be used, the foreseeablity of injury to third parties is less apparent. However, the courts could find this to be a more reckless act in that providing an employee reference letter without knowing where it will be used allows for it to be used anywhere. Conversely, a heightened duty would appear to exist where the employee requests a recommendation and the former employer takes affirmative action to contact the potential new employer and supplies the recommendation. In this situation, the victim has a strong argument for foreseeability because the former employer took an affirmative action and knew whom the reference was intended.

VI. CONCLUSION

In recognizing negligent misrepresentation in the context of employment references as being an actionable tort against employers while encouraging employers to provide accurate employment reference information, the *Davis* court has provided yet another reason for employers to adopt "no comment" policies. Faced with an increasing proliferation of tort doctrines related to the giving of employment references, employers must be increasingly wary of providing references. Essentially, the bottom line is that employers are only immune from tort liability if they say nothing. Thus, employers would be wise to adopt "no comment" policies. Although the *Davis* court narrowly limited its holding to the facts in that case, the decision begs the question of whether or not New Mexico court's will take the next step—finding that employers have an affirmative duty to supply information of an employee's known misdeeds.[137]

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137. It is foreseeable that the New Mexico courts could, in the near future, expand a former employer's duty to third parties, finding that a former employer is liable for not commenting at all when asked for a reference. *See* Oliver, *supra* note 6, at 753. There has been considerable commentary in recent years advocating the recognition of an affirmative duty on employers to disclose information concerning a employees misdeeds. *See* Buckhalter, *supra* note 3, at 294-96 (advocating that courts impose on employers an affirmative duty of disclosure); Saxton, *supra* note 11, at 91-99 (advocating a limited affirmative duty on employers to disclose even without volunteering a referral); Swerdlow, *supra* note 3 (same).